

INTERNATIONAL REGULATORY UPDATE 08 - 12 JUNE 2020

- **Sustainable Finance: EU Commission consults on delegated acts**
- **EMIR: EU Commission consults on draft acts on supervision of third-country CCPs**
- **AIFMD: EU Commission reports on application and scope**
- **Capital Markets Union: High Level Forum publishes final report**
- **EBA consults on technical standards for prudential treatment of software assets**
- **EBA proposes enhanced standardisation of disclosure requirements laid down in Non-Financial Reporting Directive**
- **ECON Committee publishes draft report on digital finance recommendations**
- **Brexit: UK Government responds to House of Lords financial services inquiry**
- **FCA publishes framework on adequate financial resources**
- **AIFMD: Italian Treasury consults on reserved alternative investment funds**
- **CSSF issues circular on method for calculating ex-ante contributions to FGDL**
- **CSSF publishes Q&As on Payment Services Law**
- **SFC concludes consultation on regulatory scope and competence requirements under OTC derivatives licensing regime**
- **SFC proposes changes to Code on Real Estate Investment Trusts**
- **Bill introducing financial services intermediary business and classification of fund transfer services passed by National Diet**
- **Senior Minister of Singapore responds to parliamentary question on convertible bonds**
- **Recent Clifford Chance briefings: New UK emission trading system, Russian insolvency moratorium, and more. Follow this link to the briefings section.**

Clifford Chance's International Regulatory Update is a weekly digest of significant (non-Coronavirus-related) regulatory developments, drawing on our daily content from our Alerter: Finance Industry service.

To request a subscription to our Alerter: Finance Industry service, please email [Online Services](#).

If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

[Marc Benzler](#) +49 69 7199 3304

[Caroline Dawson](#) +44 207006 4355

[Steven Gatti](#) +1 202 912 5095

[Owen Lysak](#) +44 207006 2904

[Lena Ng](#) +65 6410 2215

[Gareth Old](#) +1 212 878 8539

[Mark Shipman](#) + 852 2826 8992

[Donna Wacker](#) +852 2826 3478

International Regulatory Update
Editor

[Joachim Richter](#) +44 (0)20 7006 2503

To email one of the above, please use `firstname.lastname@cliffordchance.com`

Clifford Chance LLP,
10 Upper Bank Street,
London, E14 5JJ, UK
www.cliffordchance.com

Sustainable Finance: EU Commission consults on delegated acts

The EU Commission has published for consultation two draft delegated directives and four draft delegated regulations as part of the EU's action plan on sustainable finance.

The draft acts are intended to clarify the duties of financial institutions to provide their clients with clear advice on the social and environmental risks and opportunities attached to their investments and cover:

- [mutual funds](#);
- [investment funds](#);
- [insurance firms and brokers](#);
- [\(re\)insurance companies](#);
- [investment firms](#); and
- [alternative investment funds](#) (AIFs).

Comments on the consultations are due by 6 July 2020.

EMIR: EU Commission consults on draft acts on supervision of third-country CCPs

The EU Commission has published for public consultation three draft delegated acts on the supervision of third-country central counterparties (CCPs) that provide services to EU firms under the European Market Infrastructure Regulation (EMIR). The draft acts concern [tiering](#), [comparable compliance](#), and [fees](#) charged to third-country CCPs by the European Securities and Markets Authority (ESMA).

Under EMIR, ESMA is responsible for carrying out the supervision of Tier 2 CCPs that access the EU's single market. As such, Member States and national supervisors cannot assess comparable compliance as they have no competence over Tier 2 CCPs. The objective of the draft delegated act on comparable compliance is to specify the minimum elements to be assessed and the modalities and conditions ESMA should take into account when assessing whether a Tier 2 CCP can satisfy compliance with EMIR by complying with its domestic law.

The draft delegated act on tiering lays down rules to further specify the criteria that ESMA should take into account to determine whether a third-country CCP is systemically important or likely to become systemically important for the financial stability of the EU or one of its Member States.

The draft delegated act on fees lays down the charges paid to ESMA by third-country CCPs, specifying their types, the matters for which they are due, the amounts of the fees and the manner in which they are to be paid.

Comments on all three delegated acts are due by 9 July 2020.

AIFMD: EU Commission reports on application and scope

The EU Commission has published its [report](#) assessing the application and scope of the Alternative Investment Fund Managers Directive (AIFMD).

The EU Commission's report provides the Parliament and the Council with an assessment of the functioning of the AIFMD, and reviews the leverage

calculation methods. The report builds on the general survey on the impact of the AIFMD carried out by KPMG in February and March 2018 and information obtained through work streams led by the Commission, ESMA and the European Systemic Risk Board (ESRB).

Among other things, the report found that:

- the efficacy of the EU alternative investment fund manager (AIFM) passport is impaired by national gold plating, divergences in the national marketing rules, varying interpretations of the AIFMD by national supervisors and its limited scope;
- the lack of a depositary passport is at odds with the spirit of the single market, and because of the limited choice of service providers in smaller markets, there are also fears of concentration risk where a single depositary could hold the assets of all alternative investment funds (AIFs) established in a Member State;
- further enhancement and harmonisation of financial stability measures available to national competent authorities (NCAs) under the AIFMD has been called for. This includes a recommendation from the ESRB to clarify the respective roles of NCAs and their cooperation in the cases where suspension of redemptions have cross-border implications; and
- private equity fund managers, which for their managed portfolio size do not adhere to the regulatory parameters of the AIFMD, encounter significant barriers to marketing their funds in other Member States. The report notes that some in the sector have called for the AIFMD to be amended to better accommodate the private equity sector by removing unnecessary charges and looking for more effective ways to protect non-listed companies or issuers.

The Commission is still assessing the need for further proposals, including amendments to the AIFMD, but notes that further action may be required at the EU level to deepen the market for AIFs and respond to technological developments to ensure that the AIFMD legal framework is fit for purpose.

Capital Markets Union: High Level Forum publishes final report

The High Level Forum (HLF) has published its [final report](#) on the Capital Markets Union (CMU).

Set up by the EU Commission in November 2019, the HLF comprises 28 capital markets experts tasked with reviewing and advancing the CMU initiative. To that end, the final report sets out 17 recommendations relating to the business environment, market infrastructure, retail investments and global reach, including on:

- the establishment of an EU Single Access Point (ESAP) for public information;
- targeted amendments to the legal framework for, and simplified tax rules applicable to, European Long-term Investment Funds (ELTIFs);
- amendments to risk margin and long-term equity treatment under Solvency II to encourage insurer financing, particularly of SME and midcap businesses;

- the implementation of Basel III, including targeted amendments to the Capital Requirements Regulation (CRR) and Level 2 measures under the Investment Firms Regulation and Directive (IFR/D), to promote market making and re-equitisation;
- targeted amendments to CRR, Solvency II and the Liquidity Coverage Ratio (LCR) in order to scale up the European securitisation market;
- alleviating listing rules via amendments to the Listing Directive, the Market Abuse Regulation (MAR) and the Markets in Financial Instruments Directive (MiFID2);
- clarifying how the legal framework applies to crypto / digital assets and tokenisation, and adopting a new framework for instruments which cannot be captured under existing legislation;
- a targeted review of the Central Securities Depositories Regulation (CSDR), in particular addressing issues relating to links, passporting, cross-border payments, access to non-domestic central bank money and supervision;
- a proposal for a new Shareholder Rights Regulation and a proposal for amendments to the Shareholder Rights Directive (SRD2) to address issues relating to shareholder identification, voting rights and corporate actions;
- strengthening digital operational resilience of the EU financial sector via voluntary standard contractual clauses for outsourcing arrangements and a new legislative framework;
- a pension dashboard for Member States, pension tracking for individuals and auto enrolment in occupational pension schemes;
- legislative and non-legislative measures to foster financial literacy and engagement;
- targeted amendments to MiFID2, the Insurance Distribution Directive (IDD) and PRIIPs Regulation to improve disclosure and the fairness and quality of financial advice;
- a new proposal for a regulatory framework for open finance;
- a proposal for a new Directive introducing a system for relief at source of withholding tax (WHT);
- targeted harmonisation of central elements in corporate insolvency law; and
- legislative amendments to strengthen governance, powers and the toolkit of ESMA and the European Insurance and Occupational Pensions Authority (EIOPA).

The EU Commission is seeking feedback on the report from stakeholders until 30 June, and intends to publish the next CMU Action Plan in early autumn.

EBA consults on technical standards for prudential treatment of software assets

The European Banking Authority (EBA) has launched a [consultation](#) on draft regulatory technical standards (RTS) specifying the prudential treatment of software assets.

Under the CRR prudently valued software assets are exempt from the deduction of intangible assets from Common Equity Tier 1 items, providing their value is not negatively affected by resolution, insolvency or liquidation. These draft RTS amend the existing RTS for own funds requirements for institutions to include a methodology for the prudential treatment of software assets based on the amortisation of software assets. The EBA intends the methodology to achieve an appropriate balance between maintaining a certain margin of conservatism in the prudential treatment of software assets and acknowledging their relevance from a business and an economic perspective.

Comments are due by 9 July 2020.

EBA proposes enhanced standardisation of disclosure requirements laid down in Non-Financial Reporting Directive

The EBA has [published](#) its response to the EU Commission's consultation on the review of the Non-Financial Reporting Directive (NFRD).

The EBA agrees with the need to revise the NFRD so as to meet the demand for relevant, reliable and comparable company disclosure on non-financial matters. The EBA also highlights the need to increase standardisation by setting out mandatory rather than voluntary requirements, so as to ensure comparable disclosures. The EBA supports this review as an opportunity to expand the scope of companies covered by the NFRD, in a proportionate way.

ESMA and EIOPA have also provided [responses](#) to the consultation. Along with their responses, the three European Supervisory Authorities (ESAs) have submitted a joint letter highlighting certain key messages, which are of particular importance for the future of Europe's non-financial reporting regime.

ECON Committee publishes draft report on digital finance recommendations

The EU Parliament Economic and Monetary Affairs (ECON) Committee has published its [draft report](#) on proposed recommendations for the EU Commission on digital finance. The report contains a motion for an EU Parliament resolution aimed at addressing the fragmentation of existing regulation and providing a comprehensive regulatory framework for the treatment of cryptoassets, cyber resilience, digital onboarding and the use of data. In particular the report calls on the EU Commission to:

- develop a pan-European cryptoasset taxonomy;
- target the most pressing risks emerging from the increased use of cryptoassets and ensure that new risks can be identified at an early stage;
- incorporate know your customer obligations and oversight requirements into the cryptoasset legislative framework;
- amend legislation in the area of ICT and cyber security requirements for the financial sector to address inconsistencies, gaps and loopholes, with a focus on modernisation, reporting of incidents, resilience testing and third-party providers;
- examine how to ensure that digital finance entities can access relevant and useful data to facilitate their growth;

- ensure there is effective oversight of 'big data' analytics and transparency around fintech activities; and
- consider the possibility of introducing a framework for digital on-boarding.

Brexit: UK Government responds to House of Lords financial services inquiry

The UK Parliament has published a [letter](#) from HM Treasury (HMT) dated 27 May 2020 responding to the House of Lords (HoL) EU Financial Affairs Sub-Committee's recommendations following its review of financial services after Brexit.

Among other things, the UK Government has highlighted:

- its intention to seek equivalence across all the approximately 40 equivalence regimes, and that while equivalence assessments are unilateral processes and not part of the ongoing negotiations on the future UK/EU relationship, both the UK and EU are currently conducting their own assessments;
- its intention to agree a process of adoption, suspension and withdrawal of equivalence decisions which ensures transparency and stability without compromising autonomy;
- the opinion of the Bank of England's Financial Policy Committee that further action is required by EU authorities to mitigate risks to financial stability and disruption to financial services at the end of the transition period, such as by positive equivalence decisions in relation to cleared and uncleared derivatives and a positive data adequacy decision;
- its intention to publish more information on the next phase of the future regulatory framework review in the second half of this year;
- its commitment to implementing the remaining Basel III reforms and its intention to provide global leadership on high standards of regulation; and
- its intention to deploy the UK's independent financial services trade and regulatory powers to enhance its links to key global financial centres, combatting market fragmentation, improving collaboration between states and promoting cross-border activity.

FCA publishes framework on adequate financial resources

The Financial Conduct Authority (FCA) has published its [final guidance](#) on a framework to help financial services firms ensure they have adequate financial resources and take effective steps to minimise harm.

The guidance sets out the FCA's expectations of how firms determine they have adequate financial resources. It applies to all FCA solo-regulated firms subject to threshold conditions and/or the principles for businesses (PRIN) and aims to provide more clarity on:

- the role of adequate financial resources in minimising harm;
- the practices firms can adopt when assessing adequate financial resources; and
- how the FCA assesses the adequacy of a firm's financial resources.

The FCA intends to improve the way firms operate so they can take effective steps to prevent harm from occurring, by improving controls and reducing the risk in their activities. The FCA believes that the COVID-19 crisis underlines the need for all firms to have adequate resources and to assess how those needs may change in the future. Having adequate financial resources allows firms to operate and provide services through the economic cycle and allows for an orderly wind-down without causing undue economic harm to consumers or to the integrity of the UK financial system.

AIFMD: Italian Treasury consults on reserved alternative investment funds

The Italian Department of the Treasury has launched a public [consultation](#) on Article 14 of Ministerial Decree no. 30/2015, with a view to expanding the definition of 'semi-professional investors' to whom reserved alternative investment funds (AIFs) can be offered.

Under the current version of Article 14 of Ministerial Decree no. 30/2015, reserved AIFs can be offered, amongst others, to 'professional investors' (as defined under MiFID2) and non-professional investors that invest at least EUR 500,000 ('semi-professional investors').

The proposed amendments to Article 14 are intended to re-define the category of 'semi-professional investors' to include:

- non-professional investors that invest at least EUR 100,000, with a 10% concentration limit of the relevant investor's financial portfolio; and
- professional investors (e.g., banks, investment firms) investing in AIFs in the context of individual portfolio management services on behalf of their non-professional clients.

The consultation document also includes other queries with respect to the proposed minimum threshold, the concentration limit and the reference to financial portfolio.

Comments are due by 3 July 2020.

CSSF issues circular on method for calculating ex-ante contributions to FGDL

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), acting in its function as Depositor and Investor Protection Council (Conseil de Protection des Déposants et des Investisseurs) (CPDI), has issued [circular](#) CSSF-CPDI 20/21 dated 28 May 2020 regarding the method for calculating ex-ante contributions pursuant to Article 182 of the Law of 18 December 2015 on the failure of credit institutions and of certain investment firms, as amended.

The circular is addressed to all members of the Luxembourg deposit protection scheme, the Fonds de garantie des dépôts Luxembourg (FGDL) (in particular to all credit institutions incorporated under Luxembourg law, to the POST Luxembourg, and to Luxembourg branches of non-EU/EEA credit institutions) and introduces a new method for apportioning the annual contributions between member institutions of the FGDL.

The circular repeals the prior circulars CSSF-CPDI 16/01 and 17/06 on the subject matter. However, the risk adjustment (as defined in Annex 1 of Circular CSSF-CPDI 16/01) remains applicable with one amendment, namely

the re-setting of the lower bound of the sliding scale applied to the liquidity coverage ratio.

The CSSF has acknowledged that the provisions of the new circular depart from paragraphs 35, 37 and 39 of the EBA guidelines on methods for calculating contributions to deposit guarantee schemes (EBA/GL/2015/10) which had been applied by the CSSF since 2016. The circular sets out the reasons for these deviations.

The Annexes to the circular provide the technical details of the new calculation methods.

Finally, the circular specifies that the new calculation methods apply to the annual contributions collected by the FGDL from 2020 onwards and that invoices will be issued in the coming weeks.

CSSF publishes Q&As on Payment Services Law

The CSSF has issued a [questions and answers](#) paper regarding the definition of payment accounts in accordance with the Luxembourg Law of 10 November 2009 on payment services (as amended) (the Payment Services Law), implementing the revised Payment Services Directive (PSD2).

The Q&As clarify the notion of payment accounts and the consequences of such a definition/classification under the Payment Services Law. The Q&As are addressed to all payment service providers and electronic money institutions that offer payment accounts and are established in Luxembourg.

The Q&As further provide illustrative examples of accounts that would qualify as payment accounts and other account types typically not qualifying as such, clarify the definition of 'payment transaction' and also deal with the question whether e-money accounts/wallets qualify as payment accounts, when a payment account may be considered 'accessible online' and the consequences of such a qualification.

The Q&As are to be read in conjunction with the questions and answers the EU Commission and/or the EBA have published with respect to the application of PSD2.

The CSSF intends to update the Q&As from time to time when necessary.

SFC concludes consultation on regulatory scope and competence requirements under OTC derivatives licensing regime

The Securities and Futures Commission (SFC) has published the [conclusions](#) to its December 2017 public consultation on proposed refinements to the scope of regulated activities and the competence and continuous professional training requirements under the over-the-counter (OTC) derivatives licensing regime.

The SFC has indicated that it received written submissions from industry associations, market participants, professional services firms and other stakeholders, with the responses being generally supportive.

Based on the feedback received, the SFC has confirmed that it will now work with the Government to finalise the necessary legislative changes and introduce them into the Legislative Council. It has also confirmed that the OTC derivatives licensing regime will not be implemented until the

amendments to other relevant subsidiary legislation, including the Securities and Futures (Financial Resources) Rules (FRR), are completed. In the meantime, it intends to maintain close dialogue with the industry on issues relating to the OTC derivatives licensing regime.

The SFC has indicated that conclusions on the remaining rule changes proposed in the December 2017 consultation paper will be published separately in due course.

SFC proposes changes to Code on Real Estate Investment Trusts

The Securities and Futures Commission (SFC) has launched a public [consultation](#) on proposals to amend the Code on Real Estate Investment Trusts (REITs) to provide Hong Kong REITs with more flexibility in making investments.

The proposed amendments are mainly intended to:

- allow a REIT to invest in minority-owned properties subject to various conditions and requirements, as well as in property development projects in excess of the existing sub-limit of 10% of its gross asset value (GAV) subject to unitholders' approval and other conditions;
- increase the borrowing limit for REITs from 45% to 50% of their respective GAV; and
- broadly align the requirements for REITs' connected party transactions and notifiable transactions with the requirements for listed companies, in line with existing policy and practices.

Comments on the consultation are due by 10 August 2020.

Bill introducing financial services intermediary business and classification of fund transfer services passed by National Diet

The Japanese Financial Services Agency (FSA) has announced that the bill for the revision of the Act on Sales of Financial Instruments and the Payment Services Act has been passed by the National Diet (Amended Law). The [Amended Law](#) introduces two major changes in the financial services licence regime in Japan.

First, a new regulated business, 'Financial Services Intermediary Business', has been introduced by amending the Act on Sales of Financial Instruments. Under the existing Japanese financial regulations, marketing licences for financial products are designed based on business sectors and products and, as a consequence, each different sector/product requires a different licence. Under the Amended Law, a single registration of financial services intermediary business can cover different products and services across different businesses and enable service providers to act as intermediaries for multiple financial institutions in handling their products and services. This part of the Amended Law will come into force by the end of December 2021.

Second, the Amended Law introduces three categories of 'fund transfer businesses' under the Payment Services Act and adopts risk-based compliance requirements depending on the categories of fund transfer businesses based on the maximum limits on remittance amounts. It also clarifies some regulatory ambiguity regarding the scope of regulated fund

transfer businesses: receipt agent services among individuals (known as 'bill splitting application' services) should be regulated under the fund transfer business licensing regime, with certain fintech businesses likely to be affected. This part of the Amended Law will come into force by June 2021.

Senior Minister of Singapore responds to parliamentary question on convertible bonds

In [response](#) to a parliamentary question on whether the Monetary Authority of Singapore (MAS) will review whether convertible bonds should be issued, marketed, sold or traded to retail investors in light of the complexity and risks associated with these hybrid securities, Tharman Shanmugaratnam, Senior Minister and Minister in charge of the MAS, has clarified that:

- for complex investment products which the average retail investor may not understand, the MAS requires financial institutions to implement certain safeguards; and
- convertible bonds are currently classified as non-complex as the product is well-established in the market, and the terms and features can be understood by most retail investors. However, in recent years, issuers have introduced non-conventional convertible bonds with features that retail investors may not be familiar with. The MAS is therefore reviewing the classification of these products and other hybrid securities, and expects to issue a public consultation paper in this regard by the end of 2020.

RECENT CLIFFORD CHANCE BRIEFINGS

Carbon price clarity – a new UK emission trading system from 2021

The UK Government has confirmed that it intends to establish a UK emissions trading system (ETS) from 1 January 2021.

The ETS could operate either as a standalone system or be linked to other systems such as the EU ETS. The design of the system has borrowed heavily from the EU ETS but it is more ambitious in its climate targets, adopting an initial emissions cap that will be 5% lower than the UK's notional share of the EU ETS cap for Phase IV of the EU ETS.

This briefing sets out the key points to note from the proposal.

<https://www.cliffordchance.com/briefings/2020/06/carbon-price-clarity--a-new-uk-emissions-trading-system-from-2021.html>

Insolvency moratorium and rescheduling of debts in insolvency

Further amendments to the Russian Law on Insolvency (Bankruptcy) relating to recently introduced rules on the application of the moratorium on the filing of creditors' petitions for insolvency of Russian companies have been adopted. As of 8 June 2020, when the amendments became effective, Russian companies with respect to which the Russian Government introduced a moratorium on insolvency on 6 April 2020, and which initiate their own insolvency, will be entitled to petition the court for the rescheduling of certain debts.

This briefing outlines the requirements which an affected company should satisfy to obtain approval from the court for a rescheduling, the terms of indebtedness in respect of which the rescheduling may be requested and the terms of the rescheduling itself.

<https://www.cliffordchance.com/briefings/2020/06/insolvency-moratorium-rescheduling-of-debts-in-insolvency-eng.html>

CFIUS rule changes for mandatory filings for certain transactions involving US businesses with critical technologies and involving foreign governments

The US Department of the Treasury has issued a Proposed Rule that modifies the mandatory filing provisions regarding investments in US businesses that produce, design, test, manufacture, fabricate, or develop critical technologies and for transactions involving foreign governments. These mandatory filing requirements were previously part of the 'Critical Technology Pilot Program' until incorporated into CFIUS' regulations in February 2020. The Final Rule announcement for the current CFIUS regulations previewed this switch to export control licensing requirements that highlights the major change for mandatory filings under the Proposed Rule. Given the likelihood that the Proposed Rule ultimately becomes final, it is essential that US businesses that may seek non-US investors confront the export control compliance challenges that will come with the changes to the mandatory filing framework. As such, it is important to begin planning now for this development.

This briefing discusses the Proposed Rule and the changes this will bring.

<https://www.cliffordchance.com/briefings/2020/06/cfius-rule-changes-for-mandatory-filings-for-certain-transaction.html>

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

© Clifford Chance 2020

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.